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Report of Working Group V (Insolvency Law) on the work of its forty-fourth session (Vienna, 16-20 December 2013)

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I. Introduction

(a) Centre of main interests and directors' obligations

1. At its forty-sixth session in 2013, the Commission finalized and adopted[1] two texts on insolvency law: (a) the revised Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency (set forth in A/CN.9/WG.V/WP.112, and revised by the Working Group at its forty-third session (A/CN.9/766) and by the Commission (A/68/17, para. 197)); and (b) part four of the Legislative Guide on Insolvency Law addressing the obligations of directors in the period approaching insolvency (set forth in A/CN.9/WG.V/WP.113, and revised by the Working Group at its forty-third session (A/CN.9/766) and by the Commission (A/68/17, para. 202)).

2. Those two texts were developed pursuant to a mandate[2] given to Working Group V in 2010 to initiate work on two insolvency topics: (a) providing guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) relating to centre of main interests (COMI) and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention; and (b) addressing the responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases.

3. In recommending those two texts to the Commission for adoption, Working Group V noted that it had not yet completed its work on implementing the mandate received from the Commission and that there were pending issues to be addressed before the mandate was exhausted, specifically the concept of centre of main interests as it related to facilitating the conduct of cross-border insolvency proceedings concerning enterprise groups,[3] and directors' obligations in the context of enterprise groups,[4] together with that part of the mandate relating to the possible development of a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.[5]

4. At its forty-sixth session, after adopting the two texts noted above, the Commission decided that Working Group V should hold a colloquium in the first few days of the working group session scheduled for the second half of 2013 to clarify how it would proceed with the enterprise group issues and other parts of its current mandate and to consider topics for possible future work, including insolvency issues specific to micro, small and medium enterprises (MSMEs). The conclusions of that colloquium would not be determinative, but should be considered and evaluated by the Working Group in the remaining days of that

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 198 and 204.

[2] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259.

[3] A/CN.9/766, paras. 103 and 105-107.

[4] Ibid., paras. 104 and 105-107.

[5] Ibid., paras. 105-107.

session, in the context of the existing mandate. Topics identified for possible future work should be reported to the Commission in 2014.[6]

(b) Insolvency of large and complex financial institutions

5. At its forty-third session (2010), the Commission agreed that the study proposed by Switzerland on the insolvency of large and complex financial institutions (see A/CN.9/WG.V/WP.93/Add.5 and A/CN.9/709, particularly para. 7) should be undertaken by the Secretariat as resources permitted. It was noted in that regard that reports on work being undertaken by a number of other organizations on the same topic were expected by the end of 2010 and that those reports should be factored into the Secretariat's work. It was anticipated that coordination would be sought between the Secretariat and other interested international organizations.[7]

6. The Working Group first considered this topic at its forty-second session on the basis of a note prepared by the Secretariat (A/CN.9/WG.V/WP.109), reporting on the activities being undertaken by other organizations. The deliberations and conclusions of the Working Group on this topic are included in the report of that session (A/CN.9/763, paras. 95-96).

II. Organization of the session

7. The first three days of the session (16-18 December) were devoted to the colloquium noted above in paragraph 4, which considered issues relating to remaining elements of the existing mandate, topics for possible future work and issues already mandated for future work. Following the colloquium, the Working Group convened on 19 and 20 December.

8. Working Group V, which was composed of all States members of the Commission, held its forty-fourth session in Vienna from 16-20 December 2013. The session was attended by representatives of the following States Members of the Working Group: Austria, Belarus, Brazil, Canada, China, Colombia, Croatia, Denmark, El Salvador, France, Germany, Greece, Indonesia, Iran (Islamic Republic of), Italy, Japan, Mexico, Pakistan, Paraguay, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

9. The session was attended by observers from the following States: Belgium, Bolivia (Plurinational State of), Chile, Cyprus, Czech Republic, Dominican Republic, Iraq, Lithuania, Poland, Qatar, Romania, Slovenia and United Arab Emirates.

10. The session was attended by observers from the European Union.

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[6] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 325.

[7] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 260.

11. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: International Monetary Fund and World Bank;

(b) *Invited inter-governmental organizations*: Inter-Parliamentary Assembly of the Eurasian Economic Community;

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), European Law Students Association (ELSA), INSOL International (INSOL), International Bar Association (IBA), International Insolvency Institute (III), International Swap and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), Union Internationale des Avocates (UIA) and Union Internationale des Huissiers de Justice et Officier Judiciaires (UIHJ).

12. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Ms. Jasnica Garašić (Croatia)

13. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.116);

(b) A note by the Secretariat outlining a summary of the previous discussions with respect to the remaining elements of its existing mandate, as well as proposals for possible future work (A/CN.9/WG.V/WP.117);

(c) A note by the Secretariat on recent developments with respect to the insolvency of large and complex financial institutions (A/CN.9/WG.V/WP.118).

14. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of: (a) remaining elements of the current mandate of Working Group V; (b) topics for possible future work; and (c) mandated future work.
5. Other business.
7. Adoption of the report.

III. Deliberations and decisions

15. The Working Group engaged in discussions on: (a) cross-border insolvency of multi-national enterprise groups; (b) the proposal for a convention or model law on selected international insolvency issues, including choice of law; (c) insolvency of large and complex financial institutions; (d) obligations of directors of enterprise

group of companies in the period approaching insolvency; (e) issues relating to creditors and claims; (f) the insolvency treatment of financial contracts; (g) regulation of insolvency practitioners; (h) the enforcement of insolvency-derived judgements; (i) insolvency treatment of intellectual property; and (j) expedited proceedings, including pre-packs and other mechanisms suitable for the insolvency of MSMEs on the basis of documents A/CN.9/WG.V/WP.117, and A/CN.9/WG.V/WP.118 as well as the presentations made at the colloquium. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Working Group V's current mandate

A. Facilitating the cross-border insolvency of multinational enterprise groups

16. The Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups by developing provisions on the following issues, a number of which would extend the existing provisions of the Model Law on Cross-Border Insolvency and part three of the Legislative Guide. and involve reference to the Practice Guide on Cross-Border Insolvency Cooperation:

(a) Provision of access to foreign courts for foreign representatives and creditors of insolvency proceedings involving enterprise group members;

(b) Recognition of foreign proceedings and foreign representatives (as between different proceedings concerning different group members), including recognition of foreign proceedings commenced against several group members at the same court;

(c) Distinctions between main and non-main insolvency proceedings might not be useful in group enterprise insolvencies;

(d) Recognition of one foreign proceeding as the coordinating proceeding, in appropriate circumstances;

(e) Identification of the "parent" and/or "primary group members" of an enterprise group that might adopt the role of, for example, facilitating development of a reorganization (or liquidation) plan, coordinating continuation or replacement of existing finance, and retaining professionals;

(f) Provision of "standing" for all group members in any insolvency proceeding applied for by a member of the enterprise group;

(g) Joint appointment of insolvency representatives to insolvency proceedings concerning different group members;

(h) Consideration of group members voluntarily joining the insolvency proceeding of the parent group member and agreeing to subject themselves to the jurisdiction of that proceeding;

(i) Use of "synthetic proceedings" (where creditors are treated in the main proceeding as if a non-main proceeding had opened) to reduce cost and expense;

(j) Joint financing among members of the enterprise group addressing issues of collateralization, supplier credit, guarantees, obligations and validation of collateral granted and priority for funds advanced;

(k) Authorization of contact and coordination between the courts and between the insolvency representatives (including foreign representatives or other members designated by a group) across enterprise group members subject to insolvency proceedings;

(l) Use of protocols to clearly define procedures and roles;

(m) Provision for joint/coordinated disclosure statements and plans of reorganization;

(n) Affirmation of the corporate identity and independence of group members;

(o) Provision of relief by a recognizing court to the foreign representative(s) presiding over the proceedings of several group members commenced in the same forum; and

(p) Provision of relief by a recognizing court to the foreign representative(s) presiding over the coordinating proceeding.

17. Having considered the form those provisions might take, the Working Group decided that their precise form could be decided as the work progressed. Those provisions might, for example, be a set of model provisions or a supplement to the existing Model Law.

B. Convention on selected international insolvency issues

18. Support was expressed in favour of the development of a convention as described in the proposal in paragraphs 7 to 16 of A/CN.9/WG.V/WP.117. This view was based on the need for binding norms to facilitate execution of insolvency decisions, to coordinate many aspects of cross-border insolvencies, particularly in the group context, and to deal with concerns arising in the view of some States that application of the Model Law should be reciprocal. However, a number of reservations about the feasibility of negotiating a convention were expressed, including whether there would be sufficient support from States for such an instrument, the competence of member States in regional economic integration organizations to participate in the negotiations, the time required for such negotiations, and the benefits of a convention over the existing Model Law. With respect to the latter point, the question was raised as to why the Model Law had not been more widely adopted. It was observed that many States were focused on reforming their domestic insolvency laws and asking them to consider cross-border insolvency law at the same time would be unrealistic. It was noted that adoption of the Model Law was part of a broader insolvency law reform program and that several more States were expected to enact the Model Law by the end of 2014.

19. Following expressions of support from a number of delegations, the Working Group agreed that it might be appropriate to study the feasibility of developing a convention, including gathering information on the issues facing States with respect to adoption of the Model Law. That study might be conducted informally by an ad

hoc group of interested delegations that could provide information to the Working Group for further discussion. The Secretariat was requested to facilitate such efforts on the part of interested delegations.

C. Insolvency of large and complex financial institutions

20. In view of developments subsequent to the inclusion of the proposal on cross-border insolvency of financial institutions in paragraphs 17 to 22 of document A/CN.9/WG.V/WP.117, the Working Group was provided with information modifying and clarifying the original proposal. Based on this additional information, the Working Group noted that in October 2013, the Financial Stability Board (FSB) had established a working group of legal experts with the mandate to address certain gaps in the implementation of Key Attribute 7.5 and ensure that countries developed expedited processes to give effect to foreign resolution actions and to present its preliminary conclusions and recommendations in autumn 2014. The Working Group noted that coordinating the work of organizations active in the field of international trade law, both within and outside the United Nations system, is an increasingly important task of UNCITRAL and that that task should be aimed at encouraging cooperation, at avoiding duplication of effort and promoting efficiency, consistency and coherence in the modernization and harmonization of international trade law.

21. On that basis, the Working Group agreed to continue with its current mandate referring to cross-border insolvency of financial institutions by:

(a) Welcoming the initiative of the FSB to establish a group of legal experts with the mandate to develop Key Attribute 7.5 regarding the recognition of foreign resolution actions and cross-border cooperation, and acknowledging the leading role of the FSB expert group in the development of this Key Attribute;

(b) Expressing its willingness and availability to share its know-how and legislative expertise with the FSB and its legal expert group, be it through support by the UNCITRAL secretariat, by participating in joint expert meetings or by any other means that the involved bodies may deem appropriate; and

(c) Expressing its intention to, as the FSB's legal expert group work progresses, consider its preliminary conclusions and recommendations and to report back to the Commission at a future session on what work by UNCITRAL might be desirable and feasible in the field of effective resolution regimes for financial institutions.

22. Ultimately, the Working Group encouraged the Secretariat to continue with its current mandate to monitor developments in this field, namely regulatory developments within supranational bodies or in selected national legislation.

D. Obligations of directors of enterprise group companies in the period approaching insolvency

23. The Working Group agreed on the importance of this topic given that there were clearly difficult practical problems in this area and that solutions would be of great benefit to the operation of efficient insolvency regimes. At the same time, the

Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that it would be helpful to have the next steps taken informally in an expert group whose task would be to examine how part four of the Legislative Guide could be applied in the enterprise group context and any additional issues (such as conflicts between a director's duty to its own company and the interests of the group and issues of governing law) that might need to be addressed. The informal expert group would report back to the Working Group no later than the session in the second half of 2014.

V. Topics for possible future work

A. Choice of law

24. The Working Group noted that choice of law issues formed part of the proposal for a convention (as discussed above), and that some of the elements to be addressed in the context of further work on enterprise groups (such as synthetic secondary proceedings and directors' obligations) raised choice of law questions that would need to be addressed in the course of that work. However, paragraphs 12 to 16 of document A/CN.9/WG.V/WP.117 outlined a proposal for articulating principles on choice of law that could constitute possible future work. The Working Group expressed support for that proposal, noting that choice of law issues were key to many of the topics discussed in document A/CN.9/WG.V/WP.117.

B. Issues relating to creditors and claims

25. The Working Group agreed on the importance of a number of the issues raised under this heading (paragraphs 26 to 34, A/CN.9/WG.V/WP.117) and noted that several of them were likely to be addressed in the context of facilitating reorganization of enterprise groups, for example, access to information and creditor participation. The Working Group also noted that some of the issues could be addressed at a procedural level, but could raise significant difficulties if approached from a substantive perspective, for example, procedures for making claims as opposed to quantification of claims. Although there was support for undertaking work on some of these issues, it was felt that they were not a priority at this stage in view of the other topics being proposed.

C. Insolvency treatment of financial contracts and netting

26. In considering paragraphs 35 to 38 of document A/CN.9/WG.V/WP.117, it was observed that the development of the Unidroit Principles on Close-Out Netting had led to there being some inconsistency with recommendations 101 to 107 of the Legislative Guide on Insolvency Law and some concern was raised that the Legislative Guide no longer reflected best practice. One view was that in order to avoid reopening issues that had been carefully resolved in the Principles, no further

work on the Legislative Guide was required. Related views were that the Legislative Guide should refer to the Principles or that that chapter of the Legislative Guide should be deleted. A different view was that if the Guide no longer reflected best practice, it needed to be addressed by the Working Group and that any concern about duplication should be allayed by the fact that the Principles focus on close-out netting, while the Legislative Guide deals with a broader range of issues. There was general agreement that any work revising the Guide should ensure that there was no contradiction with the Principles or with other work being carried out on related issues by organizations such as the FSB and should take into account the different treatment in insolvency of banks and financial institutions on the one hand and non-bank and non-financial institutions on the other. The prevailing view was that future work on this topic should be undertaken.

D. Regulation of insolvency practitioners

27. While support was expressed in favour of the proposal contained in paragraphs 39 to 41 of A/CN.9/WG.V/WP.117, the Working Group was of the view that that work might best be developed informally in cooperation with relevant professional bodies such as the International Association of Insolvency Regulators (IAIR) with a view to possible consideration by the Working Group at a later date.

E. Enforcement of insolvency-derived judgements

28. Notwithstanding that the case in question, as noted in paragraph 42 of document A/CN.9/WG.V/WP.117, was an English case, the Working Group was of the view that it brought to light problems of a global nature. Strong support was therefore expressed in favour of the topic outlined in paragraphs 42 to 43 of that document. The Working Group noted that the Model Law did not provide an explicit solution for recognition and enforcement of insolvency-derived judgements, which had led to significant uncertainty and could have a chilling effect on further adoptions of the Model Law. Accordingly, it was an opportune time to address recognition and enforcement of these types of judgements, possibly by way of a supplement to the Model Law. A proposal to add recognition of discharge orders was also supported.

F. Treatment of intellectual property contracts in cross-border insolvency cases

29. The Working Group expressed interest in the proposal set forth in paragraphs 44 to 49 of document A/CN.9/WG.V/WP.117. Noting that it had already been addressed in the Intellectual Property Supplement to the Secured Transactions Guide, it was suggested that it might be appropriate to consider the issue as a supplement to the Legislative Guide on Insolvency Law.

G. Priorities for future work

30. The Working Group agreed that there remained significant areas for possible future work in the field of insolvency law. Having considered the priority in which work on the topics above might be undertaken, the Working Group was strongly of the view that at an appropriate time it should seek a mandate from the Commission to commence work on recognition and enforcement of insolvency-derived judgements. The Working Group was also of the view that choice of law, review of the Legislative Guide chapter on insolvency treatment of financial contracts and netting, and the treatment of intellectual property contracts in cross-border insolvency cases were important issues that warranted consideration, and should be retained in that order as candidates for possible future work.